

No. 10908

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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LENORE S. ROBINETTE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

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Transcript of the Record

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Upon Petition to Review a Decision of the Tax Court  
of the United States

FILED

NOV 24 1944

PAUL P. O'BRIEN,  
CLERK



No. 10908

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Circuit Court of Appeals  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## APPEARANCES:

For Taxpayer:

JESSE H. STEINHART, Esq.,

JOHN J. GOLDBERG, Esq.,

For Comm'r:

H. R. HORROW, Esq.

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Docket No. 1176

LENORE S. ROBINETTE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

## DOCKET ENTRIES

1943

Apr. 5—Petition received and filed. Taxpayer notified. Fee paid.

Apr. 6—Copy of petition served on General Counsel.

May 3—Answer filed by General Counsel.

May 3—Request for hearing in San Francisco, California, filed by General Counsel.

May 8—Notice issued placing proceeding on San Francisco, California, calendar. Service of answer and request made.

Oct. 14—Hearing set November 22, 1943—San Francisco, California.

1943

Nov. 26—Hearing had before Judge Arundell on the merits. Stipulation of facts filed. Briefs due January 10, 1944. Reply briefs Jan. 31, 1944.

Dec. 27—Transcript of hearing 11/26/43 filed.

1944

Jan. 11—Motion for leave to file the attached brief, brief lodged, filed by General Counsel. 1/12/44 granted and served 4/4/44.

Apr. 1—Motion for leave to file the attached printed brief, filed by taxpayer. 4/3/44 granted.

Apr. 3—Brief filed by taxpayer.

Apr. 4—Copy of motion and brief served on general Counsel.

Apr. 27—Memorandum findings of fact and opinion rendered, Judge Arundell, Div. 7. Decision will be entered for the respondent. Copies served.

Apr. 27—Decision entered. C. R. Arundell, Div. 7.

May 25—Motion for rehearing and reconsideration, affidavit and memorandum of points and authorities in support thereof, filed by taxpayer.

Jun. 5—Order denying petitioner's motion for rehearing and reconsideration, entered.

Jun. 6—Copy of order and motion served on General Counsel.

Aug. 31—Bond in the amount of \$1331.84 approved and ordered filed.



1944

Aug. 31—Stipulation of venue filed.

Aug. 31—Petition for review by the U. S. Circuit Court of Appeals, 9th Circuit, filed by taxpayer.

Aug. 31—Affidavit of service by mail of petition for review filed.

Sep. 28—Designation of contents of record filed by taxpayer.

Sep. 28—Affidavit of service by mail of designation of record filed by taxpayer.

Oct. 11—Certified copy of an order from U. S. Circuit Court of Appeals, 9th Circuit, extending time to November 10, 1944 to prepare and transmit the record, filed. [1\*]

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The Tax Court of the United States

Docket No. 1176

LENORE S. ROBINETTE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau symbols IRA:90-D CWB)

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\*Page numbering appearing at top of page of original certified Transcript of Record.

dated January 9, 1943, and as a basis of her proceeding alleges as follows:

1. The petitioner is an individual whose residence is at 143 Isabella Avenue, Atherton, California. The return for the period here involved was filed with the Collector for the District of Florida.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the petitioner not earlier than January 9, 1943.

3. The taxes in controversy are income taxes for the taxable year beginning February 1, 1939 to December 31, 1939, [2] and the amount in controversy is \$665.92.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) The respondent erred in ruling that distributions received by petitioner during the taxable year from Metropolitan Properties Company, a corporation, in the aggregate sum of \$7,916.60 were and are 100% taxable or that any portion of such distributions in excess of \$2,047.63 (being 25.865% of \$7,916.60) was or is taxable.

(b) The respondent erred in ruling that petitioner's income should be increased by \$5,868.97, being the difference between the aggregate of distributions in the sum of \$7,916.60 received by taxpayer from the Metropolitan Properties Company, a corporation, during the taxable year and the portion of such distributions which is taxable, to-wit, \$2,047.63.

(c) The respondent erred in ruling that earnings capitalized by Cole-French Company in 1928 under the circumstances hereinafter set forth continued to be earnings available for dividends in the hands of Cole-French Company upon its dissolution and in the hands of Metropolitan Properties Company after dissolution and the receipt by Metropolitan Properties Company of all of the assets of Cole-French Company as hereinafter set forth.

(d) The respondent erred in determining that there is a deficiency in the income tax of the petitioner for the [3] taxable year in the sum of \$665.92, or in any sum whatever.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) During the taxable year petitioner was the owner of 833-1/3 shares of the capital stock of the Metropolitan Properties Company, a corporation. During the taxable year the petitioner received from said corporation \$7,916.60. The petitioner is informed and believes, and based upon such information and belief, states that of said distributions made by said corporation a portion thereof was made from earnings and profits accumulated since February 28, 1913, and the remainder thereof was made from capital of said corporation. On or about February 26, 1940, on the basis of information furnished to the Commissioner of Internal Revenue by said corporation, the Commissioner tentatively determined that the said distributions were and are taxable to the extent of 25.865% thereof and nontaxable to the extent of 74.135% thereof.

On or about March 5, 1940 said corporation gave written notice to the respondent of the said determination of the Commissioner and on the basis thereof the respondent made her return of income received during the taxable year and filed the same with the Collector for the District of Florida where the respondent resided at that time.

(b) At the time that said corporation, Metropolitan Properties Company, made the said distributions to the respondent and its other stockholders, said corporation had earnings and [4] profits accumulated since February 28, 1913 equal only to 25.865% of said distributions and that the entire balance of said distribution so made to respondent and the other stockholders was made from capital of said corporation.

(c) In December 1936 Metropolitan Properties Company owned all of the issued and outstanding shares of stock of Cole-French Company, a corporation. On December 24, 1936, Cole-French Company was dissolved and all of its assets were distributed to Metropolitan Properties Company. Upon the date of such dissolution and liquidation of Cole-French Company, said company had no accumulated earnings or profits and had a deficit in its earned surplus account of \$5,141.31. In 1925 Cole-French Company issued and sold 2500 shares of its capital stock of the par value of \$100 each. The selling price was \$100 per share, payable \$10 upon the issuance of said shares and the balance on call of the Board of Directors if and when such call should be made. Cole-French Company received

an aggregate of \$25,000 on account of the sale of said stock at the time of the issuance thereof in 1925. On December 27, 1928, Cole-French Company had earnings in excess of \$225,000 and had not at any time called on the purchasers of said shares of stock for any additional payment on account thereof. On December 27, 1928, the Board of Directors of Cole-French Company adopted a resolution instructing the secretary to make a journal entry as of December 31, 1928, debiting the profit and loss account with [5] \$225,000 and crediting the capital account with said sum of \$225,000, so that the credit to the capital stock account should equal the par value of the 2500 shares of stock issued. Pursuant to said resolution the secretary made said journal entry and noted in said journal that said shares of stock had become fully paid. No distribution of stock or other securities or money or other property was made by Cole-French Company to its stockholders by reason of or in connection with the said capitalization of earnings.

Wherefore, the petitioner prays that this Court may hear the proceeding and determine that there is no deficiency due from the petitioner for the tax-



able year beginning February 1, 1939 and ending December 31, 1939.

LENORE S. ROBINETTE

Petitioner

JESSE H. STEINHART

JOHN J. GOLDBERG

Counsel for Petitioner

111 Sutter Street, San Francisco, California [6]

State of California

City and County of San Francisco—ss.

Lenore S. Robinette, being duly sworn, says that she is the petitioner above named, and that she has read the foregoing petition and is familiar with the statements contained therein, and that the facts stated are true.

LENORE S. ROBINETTE

Subscribed and sworn to before me this 3rd day of April, 1943.

[Seal]

VIOLET NEUENBURG

Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires Jan. 3, 1947. [7]

EXHIBIT A

SN-IT-1

Treasury Department  
Internal Revenue Service  
74 New Montgomery Street  
San Francisco, California

Jan. 9, 1943

Office of  
Internal Revenue  
Agent in Charge  
San Francisco Division  
IRA:90-D CWB

Mrs. Lenore S. Robinette,  
143 Isabella Avenue  
Atherton, California

Madam:

You are advised that the determination of your income tax liability for the taxable year February 1, 1939 to December 31, 1939, discloses a deficiency of \$665.92 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge,

San Francisco, California for the attention of Conference Section. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,

Commissioner,

(Signed) By F. M. HARLESS

Internal Revenue Agent in  
Charge

Enclosures:

Statement

Form of waiver. [8]

### STATEMENT

San Francisco

IRA :90-D

CWB

Mrs. Lenore S. Robinette

143 Isabella Avenue

Atherton, California

Tax Liability for the Taxable Year February 1,  
1939 to December 31, 1939

	Liability	Assessed	Deficiency
Income Tax .....	\$1,154.43	\$ 488.51	\$ 665.92

In making this determination of your income tax liability, careful consideration has been given to



your protest dated September 8, 1942, and to the statements made at the conference held on September 25, 1942.

A copy of this letter and statement has been mailed to your representative, Mr. John J. Goldberg, 111 Sutter Street, San Francisco, California, in accordance with the authority contained in the power of attorney executed by you and on file in this office.

#### ADJUSTMENTS TO NET INCOME

Net income as disclosed by return (item 20, page 1).....	\$10,798.74
Unallowable deductions and additional income:	
(a) Dividends not reported .....	5,868.97
Net income adjusted .....	<u>\$16,667.71</u>

#### EXPLANATION OF ADJUSTMENTS

(a) Information of record in this office discloses that during the taxable period ended December 31, 1939 you received distributions in the amount of \$7,916.60 on stock of the Metropolitan Properties Company. In your return you included in gross income only \$2,047.63 (25.865 percent of \$7,916.60) of the distributions received. It is held that the distributions received are 100 percent taxable. The net income is, accordingly, increased by \$5,868.97. [9]

#### COMPUTATION OF TAX

Net income adjusted—11 months' period .....	\$16,667.71
Net income placed on annual basis .....	<u>\$18,182.95</u>
(\$16,667.71 x 12)	
(       11       )	
Less:	
Personal exemption .....	\$2,500.00
Credit for dependents .....	800.00       3,300.00
Balance (surtax net income).....	<u>\$14,882.95</u>

Less:

Earned income credit (10 percent of \$3,000.00).....	300.00
Net income subject to normal tax.....	\$14,582.95
Normal tax at 4 per cent on \$14,582.95.....	583.32
Surtax on 14,882.95.....	679.47
Total tax on annual basis .....	\$ 1,262.79
Tax per period 11/12 of \$1,262.79 .....	\$ 1,157.56
Less: Income tax paid at the source.....	3.13
Correct income tax liability.....	\$ 1,154.43
Income tax assessed:	
Original, account No. 201130—District of Florida .....	\$532.92
Less:	
Previous allowance .....	44.41
Net assessment .....	488.51
Deficiency of income tax .....	\$ 665.92

[Endorsed]: Filed T.C.U.S. Apr. 5, 1943. [10]

[Title of Tax Court and Cause.]

### ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above-named petitioner, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits the allegations contained in paragraph 3 of the petition.

4. (a), (b), (c), and (d). Denies that the determination of tax set forth in said notice of deficiency is based upon errors as alleged in paragraph 4 and subparagraphs (a) to (d), inclusive, thereunder, of the petition.

5. (a) Admits the allegations contained in the first two sentences of subparagraph (a) of paragraph 5 of the petition; denies the remaining allegations contained in said subparagraph. [11]

(b) Denies the allegations contained in subparagraph (b) of paragraph 5 of the petition.

(c) Admits the allegations contained in subparagraph (c) of paragraph 5 of the petition, except that the allegations in the third and last sentences of said subparagraph are denied.

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

[Signed]

J. P. WENCHEL, TMM  
Chief Counsel, Bureau of  
Internal Revenue.

Of Counsel:

ALVA C. BAIRD,

Division Counsel.

T. M. MATHER

HARRY R. HORROW

Special Attorneys,

Bureau of Internal Revenue.

[Endorsed]: Filed T. C. U. S. May 3, 1943. [12]

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[Title of Tax Court and Cause.]

## MEMORANDUM FINDINGS OF FACT AND OPINION

This proceeding involves a deficiency in income taxes for the period February 1, 1939 to December 31, 1939 in the amount of \$665.92. The sole question is whether a distribution by a corporation of which the petitioner was a stockholder was a distribution of earnings and profits of the corporation or was, in part, a distribution of capital.

### FINDINGS OF FACT

The petitioner is an individual residing in the State of California. Her income tax return for the period here involved was filed with the Collector of Internal Revenue for the district of Florida, in which state she was at that time resident. [13]

During the year 1939 the petitioner owned 833 1/3 shares of stock of the Metropolitan Properties Company (hereinafter called Metropolitan), a corpora-

tion organized under the laws of the State of California on November 21, 1924. As a stockholder of that corporation she received in the period involved distributions from the corporation amounting to \$7,916.60. The petitioner returned as taxable income \$2,047.63 of that amount, or 25.865%. The return was based upon advice from the corporation that of the total distribution to her, \$5,868.97, or 74.135%, was a distribution from capital and not from earnings, profits, or surplus.

Metropolitan was, on December 24, 1936, a sole stockholder of the Cole-French Company. Immediately prior to December 31, 1928, Cole-French had issued an outstanding 2,500 shares of its capital stock of the par value of \$100 per share. These shares had been issued in 1925, pursuant to a subscription agreement by the terms of which the subscribers paid to the corporation \$10 per share, agreeing to pay the balance of \$90 per share in such amounts and at such times as called for by resolution of the board of directors. On December 27, 1928 the corporation had earnings in excess of \$225,000 and had at no time called on the stockholders for any additional payments. The board of directors on that date adopted the following resolution:

Resolved that the Secretary be authorized and instructed to make a journal entry as of December 31st, 1928, debiting the profit and loss account with \$225,000 and crediting the capital account with said sum of \$225,000 so that the credit to the capital stock account shall



equal the par value of 2,500 shares of stock issued and

Further Resolved that the Secretary be authorized and instructed to certify upon the face of all outstanding certificates of capital stock that the same are now fully paid up. [14]

Pursuant to the adoption of the resolution, the secretary, by a journal entry on December 31, 1928 debited the profit and loss account with \$225,000 and credited the capital account with a like amount, reflecting the capital stock as fully paid. The books of the Cole-French Company reflected the transaction as follows:

Assets	Before	After
Office funds .....	\$ 25.00	\$ 25.00
Bank of California, N. A.....	21,008.48	21,008.48
Union Trust Co. ....	1,089.90	1,089.90
Union Trust Co.—Savings .....	1,895.72	1,895.72
Accounts receivable .....	47,994.50	47,994.50
Notes receivable .....	2,250.00	2,250.00
Furniture & Fixtures .....\$3,558.16		
Depreciation ..... 324.00	3,234.16	3,234.16
<hr/>		
Stocks and Bonds .....	342,385.93	342,385.93
Personal account .....	201.84	201.84
Advances and deposits .....	31.27	31.27
	<hr/>	<hr/>
	\$420,116.80	\$420,116.80
<hr/> <hr/>		
Liabilities	Before	After
Wm. J. Boyd .....	\$ 1,895.72	\$ 1,895.72
Loans payable—(Calif. Ink) .....	100,000.00	100,000.00
Notes payable—Bank of Calif.....	50,000.00	50,000.00
Capital stock issued .....	25,000.00	250,000.00
Surplus .....	30,347.72	18,221.08
Profit and Loss (1928).....	212,873.36	.....
	<hr/>	<hr/>
	\$420,116.80	\$420,116.80
<hr/> <hr/>		

The stockholders of the Cole-French Company reported no taxable income by reason of the transaction, nor was any taxable income by reason thereof included in their income by the Commissioner.

The 2,500 shares of stock were thereafter carried on the books of the corporation as a capital stock liability in the sum of \$250,000 and were at all times since December 31, 1928 considered by the corporation as fully paid shares.

On December 24, 1936, the Cole-French Company, in complete liquidation, distributed all of its assets, subject to liabilities, to Metropolitan, its sole stockholder, in exchange for all of its shares, which [15] were then canceled and the corporation forthwith dissolved. At this time the books of Cole-French Company reflected assets and liabilities as follows:

Assets	
Revolving Funds .....	\$ 25.00
Bank of California, N. A.....	13,803.77
Union Trust Company .....	22,993.04
Anglo California Trust Co. ....	672.07
Accounts receivable .....	297,291.48
Notes receivable .....	800.00
Furniture & Fixtures .....	\$2,753.08
Depreciation .....	2,112.00
	<hr/>
Stocks and Bonds .....	674,647.32
Advances—Rodex .....	4,120.65
Deposit—Insurance .....	31.27
	<hr/>
	<u>\$ 1,015,025.68</u>
Liabilities	
Suspense—Fortuna Mine .....	\$ 166.99
Capital Stock .....	1,020,000.00
Surplus (deficit) .....	5,141.31
	<hr/>
	<u>\$ 1,015,025.68</u>

The item of capital stock in the amount of \$1,020,000 included \$250,000, consisting of \$25,000 paid prior to December 31, 1928 on account of the purchase price of the 2,500 shares above mentioned, and the \$225,000 transferred to the capital account from surplus in 1928.

The distribution by the Cole-French Company to Metropolitan was in pursuance of the complete liquidation of a wholly-owned subsidiary; by virtue of the provisions of Section 112 (b)(6) of the Revenue Act of 1936 no gain or loss to Metropolitan was recognized. The fair market value of the assets, less liabilities, received by Metropolitan exceeded the adjusted basis of the stock of Cole-French in the hands of Metropolitan by not less than \$200,000, but during 1939 the fair market value of those assets, still retained by Metropolitan, had declined by more than \$200,000.

In arriving at the deficiency herein involved the Commissioner determined that the Cole-French Company, as of December 24, 1936, had earnings, profits, and surplus amounting to \$244,968.69, [16] which sum included the amount of \$225,000 transferred from surplus to capital in 1928; and, further, that this amount constituted part of the earnings and profits of Metropolitan.

The earnings and profits of Metropolitan were sufficient to cover the entire amount of the distribution to stockholders during the taxable period in question.



## OPINION

Arundell, Judge: Two questions are raised: (1) whether the transfer from surplus to capital of \$225,000 by the Cole-French Company, thus making its shares fully paid up, served to reduce its earnings and profits available for distribution in that amount; and (2) whether the earnings and profits of Cole-French distributed to Metropolitan in liquidation became the earnings and profits of the latter company. It is conceded that if these transactions did not operate to transmute earnings into capital, Metropolitan had sufficient earnings in 1939 to render the distributions in that year taxable in their entirety.

In our opinion the transfer of \$225,000 from surplus to capital on the books of the Cole-French Company did not impair or diminish the earnings and profits of that corporation. Such a transaction is essentially equivalent to a stock dividend, and the stockholder realizes no gain. *Michaels v. McLaughlin*, 20 Fed. (2d) 959; *J. F. Carlston*, 22 B.T.A. 217. A stock dividend which is not taxable does not operate to diminish the corporate earnings for the purpose of determining the taxability of subsequent distributions. *August Horrmann*, 34 B.T.A. [17] 1178; *John K. Beretta*, 1 T.C. 86, *affd.* — Fed. (2d) — (March 3, 1944). Section 115(h), Revenue Act of 1936.<sup>1</sup>

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<sup>1</sup>Sec. 115. Distributions by Corporations.

(h) Effect On Earnings And Profits Of Distributions of Stock.—The distribution (whether before January 1, 1936, or on or after such date) to

The amount of \$225,000 remained, therefore, a part of the earnings and profits of the Cole-French Company to the time of liquidation.

The question thus becomes whether, upon liquidation, the earnings and profits of the liquidated subsidiary become the earnings and profits of the parent corporation, or are taken into capital, as the petitioner contends.

A long and uniform line of decisions stemming from *Commissioner v. Sansome*, 60 Fed. (2d) 931, certiorari denied 287 U.S. 667, has removed all doubt from this question. In the *Sansome* case it was held that accumulated earnings and profits of an original or subsidiary company transferred to a successor or parent in a tax-free reorganization, remain for purposes of distribution earnings or profits of the successor or parent. This principle has been applied in a variety of circumstances in *United States v. Kauffmann*, 62 Fed. (2d) 1045; *Helen V. Crocker*, 29 B.T.A. 733; *Murchison's Estate v. Commissioner*, 76 Fed. (2d) 641; *Reed Drug*

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a distributee by or on behalf of a corporation of its stock or securities or stock or securities in another corporation shall not be considered a distribution of earnings or profits of any corporation.

(1) if no gain to such distributee from the receipt of such stock or securities was recognized by law, or

(2) if the distribution was not subject to tax in the hands of such distributee because it did not constitute income to him within the meaning of the Sixteenth Amendment to the Constitution or because exempt to him under section 115(f) of the Revenue Act of 1934, or a corresponding provision of a prior Revenue Act.

Company v. Commissioner, 130 Fed. (2d) 288; Harter v. Helvering, 79 Fed. (2d) 12.

Equally within the principle enunciated in the above decisions is a transfer in complete liquidation, where no gain or loss is recognized. Estate of Howard H. McClintic, 47 B.T.A. 188. No gain or loss was recognized in the transfer to Metropolitan in complete liquidation of the Cole-French Company by reason of the provisions of section 112(b)(6) of the Revenue Act of 1936.

The earnings and profits of Cole-French, therefore, remained the earnings and profits of Metropolitan, adequate, in 1939, to cover the distributions here in question.

Nor does Helvering v. Credit Alliance Corp., 316 U.S. 107, affirming 122 Fed. (2d) 361, point to a different conclusion. In that case it was held that a dividends paid credit under section 27(f) of the Revenue Act of 1936 was not to be denied by reason of the fact that the distribution did not constitute a taxable dividend in the hands of the distributee. There is no suggestion that the rule announced in the Sansome case, *supra*, would not apply and that the distribution in the hands of the transferee would not continue to retain its character as undivided profits. Indeed, the Circuit Court of Appeals rather pointedly so states.

It follows that the deficiency as determined by the Commissioner must stand.

Decision will be entered for the respondent.

Entered:

Entered: April 27, 1944. [19]

(Copy)

The Tax Court of the United States  
Washington

Docket No. 1176

LENORE S. ROBINETTE,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

## DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion entered April 27, 1944, it is

Ordered and Decided: That there is a deficiency in income tax for the period February 1, 1939 to December 31, 1939, in the amount of \$665.92.

Enter.

(Seal) (S) C. R. ARUNDELL,  
Judge.

Entered April 27, 1944. [20]

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[Title of Tax Court and Cause.]

MOTION BY PETITIONER FOR  
REHEARING AND RECONSIDERATION

Now comes the petitioner in the above entitled and numbered proceeding and moves the Court for a rehearing and reconsideration of its opinion and

decision in the above entitled cause entered April 27, 1944, particularly with respect to that portion of its opinion contained on pages 6 and 7 thereof to the effect that on the basis of *Commissioner v. Sansome*, 60 Fed. (2d) 931, and *Estate of Howard H. McClintic*, 47 B.T.A. 188, the earnings and profits of Cole-French Company upon liquidation became the earnings and profits of Metropolitan properties Company, and upon such rehearing and reconsideration to decide that the cases of *Commissioner v. Sansome*, supra, and *Estate of Howard H. McClintic*, supra, are not applicable to the liquidation of a subsidiary in 1936, prior to the amendment in 1938 of Section 115(h) of the Revenue Act of 1936, and, accordingly, to enter a decision for petitioner.

This motion is made on the following grounds:

1. The said portion of the opinion of the Court above referred to and contained on pages 6 and 7 thereof, and [22] the decision entered in pursuance thereto, are not in accordance with law and are erroneously based on the case of *Commissioner v. Sansome*, supra, and the principle enunciated therein, for the reason that the principle of *Commissioner v. Sansome* is not applicable to the liquidation of a subsidiary corporation and for the further reason that the question of the extent to which the principle of *Commissioner v. Sansome* should be applied was before the Congress in the preparation of the Revenue Act of 1936 and at that time the Congress by means of Section 115(h) of said Act determined to limit the application of the principle of Commis-



sioner v. Sansome to tax-free reorganizations and not to extend the same to liquidations of subsidiaries, as was subsequently done by the amendment of Section 115(h) in the Revenue Act of 1938;

2. After petitioner received respondent's brief and noted therein that respondent relied upon *Commissioner v. Sansome supra*, and upon the asserted application of the principle of that case to the liquidation of a subsidiary in the case of *Estate of Howard H. McClintic, supra*, and also upon Section 115(h) as amended by the Revenue Act of 1938 and upon Article 115-11 of Regulations 94 accompanying the Revenue Act of 1936 and enlarging without authority the scope of Section 115(h), petitioner determined to file a reply brief as permitted by the order of the Court herein in order to point out that the facts in *Estate of Howard H. McClintic, supra*, were not the same as in the case at bar and therefore not controlling herein, that the codification of the principle of the *Sansome* case in 1936 in terms limited the same to tax-free reorganizations and omitted the application thereof to liquidations of subsidiaries, that the amendment in 1938 ex- [23] tending the principle of the *Sansome* case to the liquidation of subsidiaries has been expressly held by the Supreme Court of the United States to have no effect on liquidations in 1936 and that the attempt of the Treasury Department in Regulations 94, Article 115-11, to apply the principle of the *Sansome* case as set forth in Section 115(h) of the Revenue Act of 1936 to the liquidation of subsidiaries was unauthorized and has been so held;

3. The said brief of respondent was received by petitioner on April 10, 1944, whereupon petitioner's attorneys immediately commenced the preparation of the said reply brief and had completed the same in condition to be furnished to the printer for printing on April 29, 1944 with the intention of applying to the Court for such slight additional time as might elapse over and above twenty days from receipt of respondent's brief, within which to file the reply brief with the Court. On April 30, 1944 petitioner sent a telegram to the Court advising it of the said situation, whereupon on May 1, 1944 petitioner received a telegram from the clerk of the Court to the effect that the opinion and decision had been entered on April 27, 1944, prior to the expiration of the twenty-day period within which petitioner assumed that her reply brief could be filed;

4. Petitioner's memorandum of points and authorities filed herewith presents the matters which would have been contained in petitioner's reply brief were it not for the prior entry of the opinion and decision herein and such points and authorities should be considered by the Court prior to the final disposition of this cause.

The facts with respect to the preparation of petitioner's reply brief and failure to file the same prior to the entry [24] of opinion and decision herein are set forth in the affidavit of petitioner's attorney, John J. Goldberg, filed herewith.

This motion, designated as a motion for rehearing and reconsideration, is intended as a motion to have the Court reconsider its opinion and decision herein

and thereafter to enter an opinion and decision herein in conformity with this motion, to-wit, an opinion and decision in favor of petitioner. The opinion of the Court was entered April 27, 1944 and received by petitioner on May 1, 1944. It is intended that this motion and the said affidavit and memorandum of points and authorities will be received and filed by the Court on or before May 27, 1944 so as to be within time for any and all motions referred to in Rule 19 of the Rules of Practice of the Court. Any delay which would cause such receipt and filing to occur later than May 27, 1944 will be occasioned by delay in the mails between San Francisco, California and Washington, D. C. Accordingly, as a part of this motion petitioner requests that the same be received and filed as within time under the said Rule 19 even though a delay of several days should occur by reason of loss of time in transit.

This motion is based on the statements herein contained, on the said affidavit of John J. Goldberg, on the said memorandum of points and authorities filed herewith and on all of the records on file in this cause.

Dated, San Francisco, California.

May 19, 1944.

JESSE H. STEINHART,

JOHN J. GOLDBERG,

Counsel for Petitioner. [25]



[Title of Tax Court and Cause.]

AFFIDAVIT OF JOHN J. GOLDBERG IN  
SUPPORT OF MOTION FOR REHEAR-  
ING AND RECONSIDERATION

State of California,

City and County of San Francisco,—ss.

John J. Goldberg, being first duly sworn, deposes  
and says:

I am and have been at all of the times during the pendency of the above entitled cause one of the attorneys for petitioner herein and am the attorney who has personally handled the said cause and all proceedings therein on behalf of petitioner.

At the oral hearing of said cause in San Francisco, California on November 26, 1943 the Court allowed the parties forty-five (45) days within which to file an opening brief and twenty (20) days within which to file a reply brief. Thereupon in open Court the Clerk stated that the opening briefs should be filed on January 10 and reply briefs on January 31. (Transcript, p. 17.) Due to illness which caused my absence from my office and prevented [26] me from preparing the petitioner's opening brief within the time fixed, all of which appears in the records of the Court, the Court permitted petitioner to file her opening brief on April 3, 1944, the motion of petitioner to that effect having been granted on said date. A copy of the brief for respondent was mailed to me by the Clerk of the Court and was received at my office on April 30, 1944. There is no indication anywhere on the brief as to the date

on which said copy of respondent's brief was mailed from Washington, D. C., nor was I in any other manner advised as to the date of the mailing thereof. On the basis of the order of the Court above referred to I assumed, I believe properly, that petitioner was permitted to file a reply brief within twenty (20) days after April 10, 1944.

After examining respondent's brief and particularly respondent's reliance upon Commissioner v. Sansome, 60 Fed. (2d) 931, upon Estate of Howard H. McClintic, 47 B.T.A. 188, upon Section 115(h) as amended by the Revenue Act of 1938, and upon Article 115-11 of Regulations 94 accompanying the Revenue Act of 1936, I concluded that it was highly important to the interests of petitioner that a reply brief on behalf of petitioner be filed in order to point out the difference between the Sansome case and this one, the difference likewise between the McClintic case and this one, the fact that the rule of the Sansome case was codified in the Revenue Act of 1936, but limited to tax-free reorganizations, that the extension of such principle to the liquidation of subsidiaries was not made until 1938 and that neither the 1938 amendment nor the unauthorized attempt of Regulations 94 to enlarge the [27] scope of Section 115(h) of the Revenue Act of 1936 could be utilized to apply the principle of the Sansome case to a 1936 liquidation of a subsidiary.

I immediately commenced working on the preparation of the reply brief, in which I also included a discussion of the effect of the 1928 transaction of

Cole-French Company in transferring \$225,000 from surplus to capital. As in the case of petitioner's opening brief, I felt it would be of assistance to the Court if the brief were printed. The reply brief was made ready for the printer on Saturday, April 29, 1944. Having in mind that the reply brief should be filed within twenty (20) days, on May 1, 1944 (the twentieth day falling on Sunday), but feeling that the delay of a few days made necessary by printing the brief and mailing it to the Court would not prove objectionable to the Court in connection with a motion to extend the time for said reason, I sent a telegram to the Court on April 30, 1944, reading as follows:

“April 30, 1944.

The Tax Court of the United States  
Internal Revenue Bldg.,  
Washington, D. C.

Re Lenore S. Robinette against Commissioner  
Docket Number 1176. Petitioner's reply brief is being furnished to printer and will be forwarded to the court for filing during the week of May first together with formal motion for an extension of time within which to file reply brief. Respectfully yours

John J. Goldberg.”

On Monday morning, May 1, 1944, I received a telegram from the Clerk of the Court reading as follows: [28]

“May 1, 1944.

John J. Goldberg, Esq.

111 Sutter St.

San Francisco, California

Retel opinion entered April twenty seventh  
copy mailed you same day.

B. D. Gamble, Clerk.”

On the same day I sent the following telegram to  
the Clerk of the Court:

“May 1, 1944.

“B. D. Gamble, Clerk

The Tax Court of the United States

Washington, D. C.

Re Robinette Docket 1176. We received respondent's brief April 10. Court had ordered twenty days for reply brief so assumed petitioner's reply brief could be filed on or before April 30 which accounts for our telegram to you on April 30 explaining slight delay. Have not received opinion but believe reply brief would have been helpful to the court and may on that account move for reconsideration if opinion adverse.

John J. Goldberg.”

The opinion of the Court was received later in the day on May 1, 1944.

I feel very strongly that the portion of the reply brief dealing with the Sansome and McClintic cases and Section 115(h) of the Revenue Acts of 1936 and 1938 should have been before the Court before

its opinion herein was entered, particularly in view of the fact that the opinion itself makes no reference to Section 115(h) of either the [29] Revenue Act of 1936 or the Revenue Act of 1938 nor to the effect of the undisputed fact that the Congress did in 1936 codify the principle of the Sansome case as applied to tax-free reorganizations and did not codify such principle with respect to the liquidation of subsidiaries until 1938. It is the petitioner's position that this demonstrates the intention of Congress not to apply the rule of the Sansome case to a 1936 liquidation of a subsidiary and I believe the question of such application in 1936 under the particular circumstances of the 1936 enactment of Section 115(h) should appear in the Court's opinion to have been considered by it in order that the petitioner may know that the Court has given consideration to that proposition.

I believe the statement of the Court on page 17 of the transcript of the oral hearing herein allowing petitioner twenty (20) days within which to file a reply brief, coupled with the absence of any advice to petitioner or her attorneys as to the date when respondent's brief was mailed to petitioner from Washington, D. C., justified me in concluding that petitioner would be allowed to file a reply brief within twenty (20) days after the date on which her attorneys received respondent's brief. Had the entry of the Court's opinion and decision been delayed during such twenty-day period then it would appear reasonable that in view of my telegram to the Court sent on April 30, 1944, the Court would have allowed petitioner an additional few days within



which to print and mail her reply brief, and under those circumstances the points now made in the accompanying memorandum of points and authorities would have been before the Court and would have [30] been considered prior to the entry of the opinion and decision herein.

Under these circumstances, I believe it is fair and reasonable to request the Court to reconsider its opinion and decision herein on the basis of the accompanying memorandum of points and authorities and thereafter to render such opinion and decision herein as may appear to the Court to be required on the basis of such points and authorities.

JOHN J. GOLDBERG.

Subscribed and sworn to before me this 19th day of May, 1944.

(Seal) VIOLET NEUENBURG,  
Notary Public in and for the City and County of  
San Francisco, State of California.  
My Commission Expires Jan. 3, 1947.

[Endorsed]: Filed T.C.U.S. May 24, 1944. [31]

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[Title of Tax Court and Cause.]

### ORDER

Under date of May 25, 1944, petitioner filed a motion for rehearing and reconsideration of the Court's opinion and decision in the above-entitled cause entered April 27, 1944. This motion was accompanied by an affidavit of petitioner's counsel and

also by a "Memorandum of Points and Authorities in Support of Motion for Rehearing and Reconsideration." Very careful consideration has been given to this motion and to the brief accompanying it. After due deliberation, it is

Ordered: That the motion by petitioner for rehearing and reconsideration of this Court's opinion and decision in the above-entitled cause entered April 27, 1944, be and the same is hereby denied.

(Signed) C. R. ARUNDELL

Judge.

Dated: June 5, 1944. [65]

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[Title of Tax Court and Cause.]

#### STIPULATION

Whereas, the income tax return of Lenore S. Robinette for the period involved in the above entitled matter was filed with the Collector of Internal Revenue for the District of Florida, in which state Lenore S. Robinette was at that time a resident; and

Whereas, at all times since the commencement of the above entitled matter Lenore S. Robinette was and she now is an individual residing in the State of California; and

Whereas, Lenore S. Robinette intends to file a petition for review of the decision of the Tax Court of the United States in the above entitled matter;

It is hereby stipulated and agreed by and [66] between Lenore S. Robinette and the Commissioner

of Internal Revenue, by their respective attorneys, that the United States Circuit Court of Appeals for the Ninth Circuit is designated by said parties as the Circuit Court of Appeals wherein the decision of the Tax Court of the United States in the above entitled matter may be reviewed.

JESSE H. STEINHART

JOHN J. GOLDBERG

111 Sutter Street

San Francisco, California

Attorneys for Petitioner.

SAMUEL O. CLARK, JR.

Assistant Attorney General,

Attorney for Commissioner

of Internal Revenue.

Dated: July 21, 1944.

[Endorsed]: Filed T. C. U. S. Aug. 30, 1944. [67]

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United States Circuit Court of Appeals  
for the Ninth Circuit

Docket No. 1176

LENORE S. ROBINETTE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

PETITION FOR REVIEW OF DECISION OF  
THE TAX COURT OF THE UNITED STATES

To the Judges of the United States Circuit Court of  
Appeals for the Ninth Circuit:



The above named petitioner hereby petitions for a review of the decision of The Tax Court of the United States and as a basis of her proceeding alleges as follows:

1. The petitioner is an individual whose residence is at 143 Isabella Avenue, Atherton, California. The return for the period here involved was filed with the Collector for the District of Florida.

2. The taxes in controversy are income taxes for the taxable period beginning February 1, 1939, and ending December 31, 1939, and the amount in controversy is Six Hundred Sixty-five Dollars and Ninety-two Cents (\$665.92). [68]

3. The facts involved are as follows:

(a) Petitioner was and she now is a shareholder in Metropolitan Properties Company, a California corporation, incorporated on November 21, 1924, with its principal place of business located in San Francisco, California. Cole-French Company was incorporated under the laws of the State of California in December, 1919, with its principal place of business in San Francisco, California, and was dissolved on December 24, 1936.

(b) On December 24, 1936, Metropolitan Properties Company was the sole stockholder of Cole-French Company. On December 24, 1936, Cole-French Company was dissolved in a complete liquidation carried out pursuant to the provisions of section 112 (b) (6) of the Revenue Act of 1936, under which no gain or loss to Metropolitan Properties Company was recognized. In connection with and as a part of the dissolution of Cole-French Com-

pany, Metropolitan Properties Company surrendered all of the stock of Cole-French Company to that corporation, and in cancellation of all of such stock Cole-French Company distributed to Metropolitan Properties Company, subject to liabilities, all of the assets of Cole-French Company.

(c) On December 24, 1936, just prior to the dissolution of Cole-French Company, Cole-French Company had earnings, profits and surplus of not more than Two Hundred Forty-four Thousand [69] Nine Hundred Sixty-eight Dollars and Sixty-nine Cents (\$244,968.69).

(d) On January 1, 1939, Metropolitan Properties Company had outstanding eleven thousand six hundred (11,600) shares of its capital stock of the par value of One Hundred Dollars (\$100.00) each. In 1939 the par value of said stock was reduced to Eighty Dollars (\$80.00) per share, and there was recorded on the books of Metropolitan Properties Company the amount of Two Hundred Thirty-two Thousand Dollars (\$232,000.00) designated "Reduction of Surplus Account". During the taxable year petitioner was the owner of eight hundred thirty-three and one-third ( $833\frac{1}{3}$ ) shares of the capital stock of Metropolitan Properties Company, which shares had an adjusted basis to petitioner of not less than Eighty Dollars (\$80.00) per share.

(e) During the taxable period Metropolitan Properties Company distributed One Hundred Ten Thousand Two Hundred Dollars (\$110,200.00) to its shareholders. Petitioner received distributions

from said corporation during said taxable period aggregating Seven Thousand Nine Hundred Sixteen Dollars and Sixty Cents (\$7,916.60). In connection with said distributions, petitioner was advised by Metropolitan Properties Company that Two Thousand Forty-seven Dollars and Sixty-three Cents (\$2,047.63), or 25.865% of said distributions was taxable income, and that Five Thousand Eight Hundred Sixty-eight Dollars and Ninety-seven Cents (\$5,868.97), constituting 74.135% of said distribution, was a distribution from the [70] capital of said corporation and not from earnings or profits of Metropolitan Properties Company. Pursuant to such advice, petitioner returned Two Thousand Forty-seven Dollars and Sixty-three Cents (\$2,047.63) as taxable income.

(f) Respondent determined that all of said distributions received by petitioner constituted taxable income and assessed a deficiency in federal income taxes for said taxable period in the amount of Six Hundred Sixty-five Dollars and Ninety-two Cents (\$665.92). In arriving at said deficiency respondent determined that prior to the distributions of Metropolitan Properties Company to its shareholders during the taxable period of One Hundred Ten Thousand Two Hundred Dollars (\$110,200.00) the earnings or profits of Metropolitan Properties Company available for the payment of dividends was Three Hundred Twenty-one Thousand Fifty-five Dollars and Twenty-one Cents (\$321,055.21). Respondent has conceded that said amount should be reduced to Two Hundred Eighty-three Thousand

Eight Hundred Eighty-three Dollars and Thirteen Cents (\$283,883.13). In determining the earnings or profits of Metropolitan Properties Company prior to the distributions during said taxable period, respondent included therein as earnings or profits of Metropolitan Properties Company the earnings or profits of Cole-French Company as of December 24, 1936, and just prior to the dissolution of Cole-French Company, in the amount of Two Hundred Forty-four Thousand Nine Hundred Sixty-[71] eight Dollars and Sixty-nine Cents (\$244,968.69).

5. That on or about April 5, 1943 petitioner filed a petition with The Tax Court of the United States for a re-determination of the deficiency asserted by respondent in the amount of Six Hundred Sixty-five Dollars and Ninety-two Cents (\$665.92), which petition alleged that respondent erred in ruling that petitioner's income should be increased by Five Thousand Eight Hundred Sixty-eight Dollars and Ninety-seven Cents (\$5,868.97), being the difference between the aggregate of distributions in the sum of Seven Thousand Nine Hundred Sixteen Dollars and Sixty Cents (\$7,916.60) received by petitioner from Metropolitan Properties Company during the taxable period, and the portion of such distributions which was taxable, to-wit: Two Thousand Forty-seven Dollars and Sixty-three Cents (\$2,047.63). Said proceeding was entitled "Lenore S. Robinette vs. Commissioner of Internal Revenue, Docket No. 1176." That on April 27, 1944 The Tax Court of the United States issued an opinion and decision in said proceeding that the deficiency in the amount



of Six Hundred Sixty-five Dollars and Ninety-two Cents (\$665.92) as determined by respondent was proper.

5. That within the time and in the manner provided by law and on the 25th day of May, 1944, petitioner filed with The Tax Court of the United States a motion for a rehearing and reconsideration of the opinion and decision of The Tax Court of the United States in said proceeding. On [72] June 5, 1944, The Tax Court of the United States made an order that the motion by petitioner for rehearing and reconsideration of said Court's opinion and decision in the said cause entered April 27, 1944, be denied.

6. Petitioner respectfully petitions for a review of said decision of The Tax Court of the United States on the ground that said decision is not in accordance with law in that The Tax Court of the United States erred in ruling that the earnings or profits of Metropolitan Properties Company were increased by the distribution in 1936 of the assets of Cole-French Company to Metropolitan Properties Company in complete liquidation under section 112 (b) (6) of the Revenue Act of 1936. Jurisdiction of this proceeding is conferred upon this Court by Subdivision (a) of Section 1141 (26 U.S.C.A.).

7. Venue of this proceeding has been conferred upon this Court by a stipulation in writing by and between the Commissioner of Internal Revenue and petitioner designating the United States Circuit Court of Appeals for the Ninth Circuit as the Circuit Court of Appeals wherein the decision of The Tax Court of the United States in said proceeding

may be reviewed. A copy of said written stipulation is attached hereto marked Exhibit "A" and incorporated herein and made a part hereof by reference.

Wherefore, petitioner, being without remedy in the premises except in this Court, prays this Court: [73]

(a) To review each and every part of the record in said proceeding before The Tax Court of the United States, and to review the decision of The Tax Court of the United States made and entered April 27, 1944, and to reverse and set aside in whole said decision.

(b) To issue forthwith its order to The Tax Court of the United States directing it to certify and file with the Clerk of this Court a transcript of the record upon which its decision, dated April 27, 1944, was made.

(c) To grant such other and further relief as to this Court shall seem meet and proper in the premises.

Dated August 24, 1944.

LENORE S. ROBINETTE

Petitioner.

JESSE H. STEINHART

JOHN J. GOLDBERG

Room 700, 111 Sutter Street  
San Francisco, California  
Attorneys for Petitioner. [74]

For Exhibit "A" see page 33.



State of California,  
City and County of San Francisco—ss.

Lenore S. Robinette, being first duly sworn, on oath deposes and says:

That she is the petitioner herein; that she has read the foregoing petition and knows the contents thereof and that the same is true of her own knowledge except as to the matters which are therein stated on information and belief, and as to those matters she believes it to be true.

LENORE S. ROBINETTE

Subscribed and sworn to before me this 24th day of August, 1944.

[Seal]

VIOLET NEUENBURG

Notary Public in and for the City and  
County of San Francisco, State of  
California.

My Commission expires January 3, 1947.

(Affidavit of Service attached.)

[Endorsed]: Filed T.C.U.S. Aug. 30, 1944. [75]

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[Title of Tax Court and Cause.]

### AGREED STATEMENT OF FACTS

It Is Hereby Stipulated and Agreed by and between Lenore S. Robinette and the Commissioner of Internal Revenue by their respective attorneys that for the purposes of this proceeding the following facts are true and correct and that the Court may

incorporate the same into its findings of fact, subject to the right of either party to introduce further evidence not inconsistent with the facts herein stipulated and to object to the relevance or materiality of any of such facts:

1. That petitioner is now and has been for several years last past a citizen and resident of the State of California and prior thereto and at the time of filing the return of income for the taxable year beginning February 1, 1939 and ending December 31, 1939 was a citizen and resident of the State of Florida; [78]

2. That Metropolitan Properties Company is now and at all of the times herein mentioned was a corporation duly created, organized and existing under the laws of the State of California, with its principal place of business in the City and County of San Francisco in said state; that said corporation was incorporated on November 21, 1924;

3. That at all of the times herein mentioned to and including December 24, 1936 Cole-French Company was a corporation duly created, organized and existing under and by virtue of the laws of the State of California, with its principal place of business in the City and County of San Francisco in said state; that Cole-French Company was incorporated in December 1919 and was duly and regularly dissolved on December 24, 1936;

4. That during the said taxable year beginning February 1, 1939 petitioner was a stockholder of Metropolitan Properties Company and as such stockholder received distributions from said cor-

poration aggregating \$7,916.60; that pursuant to advice from said corporation petitioner returned as taxable income \$2,047.63 of said distribution, being 25.865% of said distribution, and failed to return as taxable the remaining \$5,868.97 constituting 74.135% of said distribution; that petitioner's failure to include said sum of \$5,868.97 in taxable income returned by her for the taxable period involved was based on advice to her by said corporation that said sum was distributed to her from the capital of [79] the corporation and not from any profits, earnings or surplus of said corporation; that the Commissioner has determined that all of said distributions in the amount of \$7,916.60 constituted taxable income received by petitioner during the taxable period, and that there is a deficiency in Federal income tax due from petitioner for the taxable year in the sum of \$665.92; that if said sum of \$5,868.97 was taxable income of petitioner in said taxable period there is a deficiency in Federal income taxes paid by petitioner for said taxable period in the sum of \$665.92;

5. That at all of the times herein mentioned Metropolitan Properties Company had outstanding 11,600 shares of its capital stock; that said shares were originally of the par value of \$100 each; that during the year 1939 such par value was by way of amendment to the articles of incorporation reduced to \$80 per share and there was recorded on the books of said corporation an amount of \$232,000 designated "Reduction of Surplus Account;" that at all of the times herein mentioned petitioner owned and

held 833-1/3 shares of the capital stock of said corporation and that said shares had an adjusted basis in the hands of petitioner of not less than \$80 per share; that during 1939 Metropolitan Properties Company distributed to its stockholders \$116,000 of which \$5,800 was distributed on January 3, 1939 and the remaining \$110,200 was distributed during the taxable period here involved; [80]

6. That in arriving at the deficiency involved in this proceeding the Commissioner determined that as of December 31, 1939 and before giving effect to distributions to its shareholders in the sum of \$116,000 which Metropolitan Properties Company made during 1939, the earnings, profits and surplus of Metropolitan Properties Company available for the payment of dividends was \$321,055.21. The Commissioner concedes that this latter amount should be reduced to \$283,883.13 to give effect to a loss by Metropolitan Properties Company of \$37,172.08 arising from a sale of securities and not reflected in its income tax returns. Said amount of \$321,055.21 includes \$2,930.62 expended by Metropolitan Properties Company for its organization and not allowable as a deduction from its taxable income. In arriving at his determination of the amount of Metropolitan Properties Company's said earnings, profits and surplus in the amount of \$321,055.21 the Commissioner included therein the earnings, profits and surplus of Cole-French Company on December 24, 1936, as determined by the Commissioner. The Commissioner determined that Cole-French Company had earnings, profits and

surplus on December 24, 1936 of \$244,968.69. In arriving at his determination that Cole-French Company had earnings, profits and surplus on December 24, 1936 in said amount of \$244,968.69 the Commissioner considered as and included in such earnings, profits and surplus the amount of \$225,000 which had been debited to profit and loss account and credited to capital account on the books of Cole-French Company as of December 31, 1928, hereinafter referred to. Petitioner disputes the said determination of the Commissioner that the said amount of \$244,968.69 [81] included by him in the earnings, profits and surplus of Metropolitan Properties Company, as aforesaid, or the said amount of \$244,968.69, constitutes or at any time constituted, in whole or in part, earnings, profits or surplus of Metropolitan Properties Company, and petitioner further disputes the determination of the Commissioner that said amount of \$225,000 or any part thereof constituted earnings, profits or surplus of Cole-French Company when it was dissolved on December 24, 1936. Certain facts with respect to said item of \$225,000 are as follows:

(a) Immediately prior to December 31, 1928 Cole-French Company had issued and outstanding 2500 shares of its capital stock of the par value of \$100 per share. These shares were issued pursuant to a subscription agreement under which the shareholders paid to the corporation \$10 per share and agreed to pay the remaining \$90 per share in such amounts and at such times as called for by resolutions of the Board of Directors of Cole-French



Company. On December 27, 1928, Cole-French Company not having at any time called on its shareholders to pay additional amounts upon such subscription agreements, the Board of Directors of Cole-French Company adopted the following resolution:

“Resolved that the Secretary be authorized and instructed to make a journal entry as of December 31st, 1928, debiting the profit and loss account with \$225,000 and crediting the capital account with said sum of \$225,000 so that the credit to the capital stock account shall equal the par value of 2500 shares of stock issued and

“Further Resolved that the Secretary be authorized and instructed to certify upon the face of all outstanding certificates of capital stock that the same are now fully paid up.”

Following the adoption of said resolution and pursuant thereto, entries reflecting the same were made in the journal [82] of Cole-French Company as shown in the following journal entries of Cole-French Company for the month of December 31, 1928 and closing entries for the year 1928:



Revenue .....	\$ 15,539.01	
Gain on sale of stocks .....	237,778.97	
Interest received .....	118.31	
Dividends received .....	5,059.37	
Profit and Loss .....		258,495.66
Profit and Loss .....	45,622.30	
Salaries .....		35,766.25
Miscellaneous expenses .....		5,952.60
Local taxes .....		711.76
Depreciation F & F .....		324.00
Interest paid .....		1,156.19
Loss on sale of stocks .....		1,711.50
Profit and Loss .....	212,873.36	
Surplus .....		212,873.36
Earnings for the year 1928		
Surplus .....	225,000.00	
Capital Stock (paid in) .....		225,000.00

To make stock "full paid" as per resolution by Board of Directors December 27, 1928.

At the time of the adoption of said resolution and prior to making the entries referred to, the books of Cole-French Company on December 31, 1928 recorded its assets, liabilities and net worth as follows: [83]

#### ASSETS

Office funds .....	\$ 25.00	
Bank of California, N. A. ....	21,008.48	
Union Trust Co. ....	1,089.90	
Union Trust Co.—Savings .....	1,895.72	
Accounts receivable .....	47,994.50	
Notes receivable .....	2,250.00	
Furniture & Fixtures .....	3,558.16	
Depreciation .....	324.00	3,234.16
Stocks and Bonds .....		342,385.93
Personal account .....		201.84
Advances and deposits .....		31.27

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\$420,116.80

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## LIABILITIES

Wm. J. Boyd .....	\$ 1,895.72
Loans payable—(Calif. Ink) .....	100,000.00
Notes payable—Bank of California .....	50,000.00
Capital stock issued .....	25,000.00
Surplus .....	30,347.72
Profit and Loss (1928) .....	212,873.36
	<hr/>
	\$420,116.80
	<hr/> <hr/>

After such entries were made the books of Cole-French Company on December 31, 1928 recorded its assets, liabilities and net worth as follows:

## ASSETS

Office funds .....	\$ 25.00
Bank of California, N. A.....	21,008.48
Union Trust Co. ....	1,089.90
Union Trust Co.—Savings .....	1,895.72
Accounts receivable .....	47,994.50
Notes receivable .....	2,250.00
Furniture & Fixtures .....	\$3,558.16
Depreciation .....	324.00
	<hr/>
Stocks and Bonds .....	342,385.93
Personal account .....	201.84
Advances and deposits .....	31.27
	<hr/>
	\$420,116.80
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[84]

## LIABILITIES

Wm. J. Boyd .....	\$ 1,895.72
Loans payable (Calif. Ink) .....	100,000.00
Notes payable—Bank of California.....	50,000.00
Capital stock issued .....	250,000.00
Surplus .....	18,221.08
	<hr/>
	\$420,116.80
	<hr/> <hr/>

(b) At the time of the adoption of said resolution none of the stockholders of Cole-French Company reported any taxable income by reason of the adoption of said resolution or by reason of any steps taken pursuant thereto, nor was any taxable income, by reason thereof, included in their income by the Commissioner, but petitioner objects to the statement contained in this subdivision (b) and to its consideration or acceptance by the Court, on the ground that such statement is irrelevant and immaterial;

(c) At the time when Cole-French Company was dissolved, on December 24, 1936, Metropolitan Properties Company was the sole stockholder of Cole-French Company. Immediately following such dissolution and on December 24, 1936 Cole-French Company in complete liquidation and upon surrender and in cancellation of all of its shares of stock held by Metropolitan Properties Company distributed and transferred to Metropolitan Properties Company subject to the liabilities all of the assets of Cole-French Company. There was recorded on the books of Cole-French Company at the time of such dissolution and distribution assets and liabilities as [85] follows:

## ASSETS

Revolving Funds .....	\$	25.00
Bank of California, N. A.....		13,803.77
Union Trust Company .....		22,993.04
Anglo California Trust Co.....		672.07
Accounts receivable .....		297,291.48
Notes receivable .....		800.00
Furniture & Fixtures .....	\$2,753.08	
Less depreciation .....	2,112.00	641.08
<hr/>		
Stocks and Bonds .....		674,647.32
Advances—Rodex .....		4,120.65
Deposit—Insurance .....		31.27
		<hr/>
		\$ 1,015,025.68
		<hr/>

## LIABILITIES

Suspense—Fortuna Mine .....	\$	166.99
Capital Stock .....		1,020,000.00
Surplus (deficit) .....		5,141.31
		<hr/>
		\$ 1,015,025.68
		<hr/>

The aforesaid item of capital stock in the sum of \$1,020,000.00 included \$250,000.00 consisting of \$25,000.00 paid prior to December 31, 1928 on account of the purchase price of 2500 shares of the aggregate par value of \$250,000.00 and \$225,000.00 recorded as a debit to surplus and as a credit to capital stock on the books of Cole-French Company pursuant to the said resolution above quoted. Said 2500 shares of capital stock of Cole-French Company were at all times after December 31, 1928 carried on the books of Cole-French Company as a capital stock liability in the sum of \$250,000.00 and the said 2500 shares were at all times since

December 31, 1928 considered by Cole-French Company as fully paid shares.

(d) The distribution by Cole-French Company to [86] Metropolitan Properties Company on December 24, 1936 was in pursuance of the liquidation of a wholly owned subsidiary and was carried out pursuant to the provisions of Section 112(b) (6) of the Revenue Act of 1936 under which no gain or loss to Metropolitan Properties Company was recognized. The fair market value of the assets, less liabilities, received by Metropolitan Properties Company on said liquidation exceeded the adjusted basis of the stock of Cole-French Company in the hands of Metropolitan Properties Company on said date by not less than \$200,000, but during 1939 the fair market value of said assets still retained by Metropolitan Properties Company had declined by more than \$200,000.

JESSE H. STEINHART

JOHN J. GOLDBERG

111 Sutter Street, San Francisco, California

Attorneys for Petitioner.

J. P. WENCHEL - RHN

Chief Counsel Bureau of Internal Revenue, Attorney for Commission of Internal Revenue.

Dated: November 26, 1943.

[Endorsed]: Filed T.C.U.S. Nov. 26, 1943. [87]

Before The Tax Court Of The United States

Docket No. 1176

LENORE S. ROBINETTE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PROCEEDINGS

Room 401, Civic Auditorium,

San Francisco, California,

Friday, November 26, 1943

10 o'clock a.m.

(Met pursuant to notice).

Before: Hon. C. R. Arundell, Judge.

Appearances:

John J. Goldberg, Esq.,

111 Sutter Street, San Francisco,

California, Appearing for Petitioner.

Harry R. Horrow, Esq.,

Appearing for Respondent. [89]

The Clerk: Docket No. 1176, Lenore S. Robinette.

Mr. Horrow: Ready for respondent, your Honor.

The Court: Will you make a brief opening statement, please?

STATEMENT ON BEHALF OF THE  
PETITIONER

Mr. Goldberg: I represent the petitioner, and on behalf of the petitioner we have agreed with counsel



for the respondent upon the facts in this matter and ask leave to file now an agreed statement of facts. Do I understand that we file an original and a copy?

The Clerk: Yes, sir.

Mr. Goldberg: I will furnish the copy in a moment.

I understand your Honor desires an opening statement in connection with this matter?

The Court: Yes.

Mr. Goldberg: This appeal involves a small deficiency but it affects one of a number of stockholders who stand in the same position and we anticipate that whatever decision is finally reached in this matter would likewise affect the other stockholders.

In this particular case the deficiency that is claimed is \$665.92 and it is for the taxable period from February 1, 1939, to December 31, 1939. The petitioner, Lenore Robinette, is the owner of 833-1/3 shares of the [91] stock of Metropolitan Properties Company, a California corporation, and the issue is whether certain distributions made by that corporation during the taxable period were entirely from earnings and profits or were in part from capital. The corporation advised its stockholders that a certain percentage was from capital of the corporation, approximately 75 per cent.

In the year in question the corporation distributed \$116,000, of which the petitioner received \$7,916.60 during the taxable period, and returned as taxable \$2,047.63.

There isn't any substantial dispute between the parties as to the amount of earnings and profits of

Metropolitan Properties Company except for the effect, if any, of a dissolution of Cole-French Company, which was a wholly owned subsidiary of Metropolitan Properties, on December 24, 1936. At that time all of the assets, and there were no liabilities, of Cole-French Company were distributed to Metropolitan Properties Company.

The Commissioner and the petitioner have agreed for the purposes of this case that if the distribution of Cole-French Company vested any earnings or profits in Metropolitan Properties Company, then there were enough earnings and profits of Metropolitan with which to make these distributions taxable. The Commissioner has determined that Cole-French Company had \$244,968.69 as earned [92] surplus at the time of its dissolution. We do not agree with that figure, and in our judgment the figure, at the very best, giving the Commissioner the benefit of the issue that is here involved, would be approximately \$220,000.

The Court: Would that make any difference?

Mr. Goldberg: It would not make any difference for the purpose of this case, and particularly in view of the small deficiency involved here we do not intend to contest that matter although we believe that the petitioner's version of the figure is correct.

There are two issues, therefore, with respect to Cole-French Company: first, whether, if it had earnings and profits at the time of its dissolution, those earnings and profits are to be considered as such in the hands of Metropolitan Properties Company fol-

lowing the distribution and therefore available for dividends.

The other question is this: in order to have the \$244,000 or the \$220,000 in earnings at the time of its dissolution, we must consider that a sum of \$225,000 which Cole-French Company had capitalized in 1928 was still earnings and profits for the purpose of distribution at the time of its dissolution in 1936.

With respect to that item of \$225,000, briefly, the facts are that the Corporation when it was organized in 1924 issued 2,500 shares of stock under a subscription [93] agreement pursuant to which the stock holders paid \$10 per share and agreed to pay the remaining \$90 whenever called for by the Board of Directors. The Board of Directors did not make any call for the balance of the \$90, but in 1928, on December 27th, having more than enough earnings with which to meet or to match the \$225,000 unpaid on the stock, the Board of Directors adopted a resolution authorizing and directing the Secretary to make an entry transferring from profit and loss to capital stock the sum of \$225,000 and marking as fully paid the certificates representing the 2,500 shares of stock. From that time on the corporation carried this item of capital stock as \$225,000 instead of as \$25,000 and unpaid subscriptions of \$225,000.

Now, the Commissioner's contention is that that \$225,000 continued as distributable surplus of the Corporation at the time of its dissolution and likewise retained the same character in the hands of Metropolitan when these distributions were made in

1939. Were it not for these amounts of Cole-French Company which are claimed to be earnings and profits, it is undisputed that the earnings of Metropolitan Properties Company available for dividends in 1939 were somewhere between \$38,000 and \$39,000 as against an actual distribution of \$116,000.

The Court: Why wouldn't that sum of \$225,000 retain its character as earnings? [94]

Mr. Goldberg: Well, in our judgment it does not come within any of the categories which the statute has fixed or which the cases have described as continuing the character of those earnings. There are several—

The Court: They are earnings or profits since 1913, aren't they?

Mr. Goldberg: Yes, since 1913. The Corporation was organized in 1913.

The Court: Well, they do not, generally speaking, lose their character by simply issuing a stock dividend, do they?

Mr. Goldberg: We contend that this was not a stock dividend.

The Court: What was it?

Mr. Goldberg: Well, it was a transfer to surplus to make—to eliminate a liability of the stockholders for the remaining \$90 per share. It did not increase the par value of the outstanding shares but served to eliminate that liability so as to make the shares fully paid.

The Court: If it amounts to a stock dividend, what then? Is the Government right?

Mr. Goldberg: I would say that if it amounts to

a stock dividend there are statutes that now provide—and I am not too clear whether they so provided in 1928 or 1936—that now provide that a subsequent distribution [95] would be a distribution of earnings, but we do not believe the situation is parallel, and, in addition to which, our further contention is that regardless of what those earnings were in the hands of Cole-French Company at the time of the dissolution of Cole-French Company and the distribution of its assets to Metropolitan Properties Company, they did not retain their character as earnings, if they were earnings in the hands of Cole-French Company, but became mingled with the assets of Metropolitan Properties Company as to which a profit or loss would be recognized upon the disposition of those assets by Metropolitan Properties Company at an amount in excess of the base in the hands of the Cole-French Company, and the fact is—

The Court: Well, was this so-called liquidation something in the nature of a merger?

Mr. Goldberg: No; it was a dissolution under the laws of California pursuant to which the Corporation was dissolved, and, having no liabilities, its assets subject to its liabilities were distributed to its sole stockholder.

The Court: Wouldn't the stockholder at that time have a gain or loss?

Mr. Goldberg: No gain or loss was recognized in that transaction.

The Court: On what ground?



Mr. Goldberg: Under 112(b) of the Rev- [96] enue Act of 1936.

The Court: What does that provide?

Mr. Goldberg: Well, that provides in the event—substantially that in the event of liquidation of a wholly owned subsidiary, and provided that the distribution is made within a certain time, no gain or loss is recognized in that transaction and any subsequent gain or loss depends on a depreciation of the assets and a comparison with the base in the hands of the dissolved corporation.

The Court: It treats it as in the nature of a reorganization within the meaning of the statute?

Mr. Goldberg: Well, it is a situation where gain or loss is not recognized. It is not defined as a reorganization in that statute nor in any of the subsequent statutes.

The Court: Is it stipulated that the property passes from the Cole-French Company to the Metropolitan under the provisions of this 112(B)? I mean, it is such a transaction as would fall within that?

Mr. Goldberg: Yes, that is the stipulation: that was the nature of the transaction, and under it no gain or loss was recognized.

The Court: Hasn't it been held in similar circumstances as here that the surplus of the old company becomes the surplus of the new? It certainly has in merger [97] or consolidation cases.

Mr. Goldberg: It has been held in certain reorganization cases where you had a reorganization that came within the definition of the statute that



the surplus of the predecessor corporation continued its character as such in the hands of the successor corporation.

The Court: Why shouldn't that apply here?

Mr. Goldberg: Well, because it is a statutory matter. We don't believe that the statute covers this situation.

The Court: It is not statutory, is it, that says that surplus of the old company shall become the surplus of the new?

Mr. Goldberg: It was not statutory when the Sansome case was decided, and I happen to have come right behind the Sansome case in a case in the District Court here decided in favor of the taxpayer, and the Circuit Court of Appeals reversed the case because the Sansome case was just decided. That was the Kaufman case, and I felt at that time that the Sansome case was not correctly decided, and I think there have been a number of criticisms of that case and a limitation of it to its facts. So, where we have a different set of facts and no statute which says that those earnings retain their character after dissolution, it would require a new decision, one that has not been [98] rendered yet, in order to give those earnings the same character.

The Court: The Sansome case has had pretty wide application now through the years?

Mr. Goldberg: Yes. But, as some writers have pointed out, Courts have accepted the Sansome case in many situations where the facts were not parallel, and it has been so pointed out with respect to the case that I mentioned, where we felt that our facts

were not the same, and I think we can point out in the brief that we desire to file that there is a distinction.

The Court: Are there any cases outstanding that have been applied to facts like in your case?

Mr. Goldberg: No, I don't know of any facts that have been parallel to the case of ours. There are some statutory provisions that I wanted to discuss although I do not know that there are any cases that have applied to them, but I believe they are applicable.

The Court: Very well, Mr. Horrow?

#### STATEMENT ON BEHALF OF RESPONDENT

Mr. Horrow: May it please the Court, there are two issues presented for your Honor's determination:

First, to what extent did the earnings and profits of the Cole-French Company pass to the Metropolitan Properties Company and become the earnings and profits of [99] that Company on liquidation of Cole-French?

Secondly, to what extent the earnings and profits of Cole-French can be reduced by the transaction in 1928 whereby the stock of Cole-French was declared paid up and a debit was made to surplus of Cole-French and a credit to its capital account.

As to the first issue, there is no dispute, your Honor, that the liquidation of Cole-French was pursuant to the provisions of Section 112(b)6 of the Revenue Act of 1936 and that no gain or loss was recognized or was recognizable under those provi-

sions to Metropolitan Properties Company. It is our position that under the Sansome case, which has been applied very broadly to situations where assets do pass over and no gain or loss is recognized, that the earnings and profits of Cole-French passed to Metropolitan and became the earnings and profits of that company. The regulations so provide, and they have provided ever since Section 112(b) (6) came into the statute, that the earnings and profits of the company being liquidated become the earnings and profits of the corporation to which the assets of the liquidated company pass. Furthermore, there have been a number of statutory provisions enacted which assume or are based on the assumption that the earnings and profits of the liquidated corporation in a case where no gain or loss is recognized become the earnings and profits of [100] the corporation to which the assets pass.

Now, as to the second question, your Honor, there is direct authority that the transaction in 1928, whereby the books of Cole-French reflected a charge to surplus and a credit to capital stock, is a transaction which gave rise to a stock dividend. The case of Michaels against McLaughlin, decided by the District Court for the Northern District of California, dealt with a situation on all fours with the situation presented here, and in that case the Court held that the transaction gave rise to a stock dividend which was not taxable to the stockholders. The tax Court has followed the case of Michaels against McLaughlin and has cited it with approval. I believe that

this Court has passed on the very situation presented here as to the nature of the transaction.

Now, if a stock dividend was distributed in 1928, I believe the statute clearly provides that earnings and profits are not reduced by that dividend. During the taxable year in question Section 115(h) of the Code provided in effect that distributions of stock do not reduce earnings and profits available for the payment of dividends.

Now, if it should be held that the transaction did not give rise to a stock dividend, in any event our position is that earnings and profits were not reduced because there was not any taxable distribution for the year [101] 1928. So, whether it is called a stock dividend or simply regarded as a recapitalization, in no event was there a distribution of earnings and profits in 1928.

The Court: Well, just what is your 1928 transaction: a right to purchase stock without a down payment by the existing stockholders?

Mr. Horrow: Yes, your Honor. There was a—

The Court: Now, to follow that, then, there is an obligation of the stockholders to pay some additional sum?

Mr. Horrow: There is a contingent obligation, your Honor. It is recognized as the obligation of the stockholders under a contract. It is contingent and was so regarded in the Michaels case.

Now, there was never any call made by the Directors of Cole-French for the payment of the balance of the subscription price, so there never was fixed any obligation on their part to pay the balance of



that price. Under the resolution adopted by the Board of Directors appropriate book entries were made and the stock was declared to be paid up. So, I believe there is direct authority that that transaction gives rise to a stock dividend, and, under the statute, earnings and profits were not reduced.

The Court: Is that a purely unilateral act by the Corporation? [102]

Mr. Horrow: Yes, your Honor. There was no action taken by the stockholders, and the stipulation so discloses.

Now, as an alternative, we take the position that even if no stock dividend is deemed to have been distributed, nevertheless there wasn't any distribution of earnings and profits, and earnings and profits have not been reduced. It is our position that the mere book entries, and that is all the transaction amounted to, do not reduce the earnings and profits available for distribution. The stipulation discloses that at the time the entries were made there was sufficient earned surplus to cover the amount of the credit to capital account.

The Court: The stockholders agreed to pay a certain price for the stock?

Mr. Horrow: Well, they subscribed for the stock and they paid \$10 down, and the balance was payable when, as and if the Board of Directors should call on the stockholders to pay the remaining capital subscribed.

The Court: Is that the way it reads: that they are to pay it only if the Corporation calls for it?

Mr. Horrow: The stipulation reads that the

stockholders agreed to pay the remaining \$90 per share in such amounts and at such times as called for by resolutions of the Board of Directors of Cole-French Company, but it is alleged in the pleadings, and we have admitted the [103] allegation, that the balance of the subscription price was payable only when, as and if the Board of Directors should make a call, and that point was brought out in the Michaels case: that, no call having been made, there wasn't any fixed obligation on the part of the stockholders to pay the amount in question.

The Court: Has the stock been delivered to the stockholders?

Mr. Horrow: Yes, our Honor. The stipulation does not reveal that fact but I believe there is no dispute that they were stockholders.

The Court: I mean, these new shares of stock were delivered at the time the 10 per cent was paid?

Mr. Horrow: Yes, as far as I know the stockholders had the shares of stock and the books of the corporation recorded the fact that the shares of stock were paid up after these book entries were made in 1928 on the stock then outstanding.

The Court: Of course, that does not answer what I asked. I said: were the shares issued prior to this transaction in 1928 or were they not?

Mr. Horrow: Yes, the stock was issued at the time the down payment on the subscription price was paid.

The Court: Is that correct?

Mr. Goldberg: I think that is a fair [104] assumption from the stipulation. We did not ex-



pressly so state, but in the second part of the resolution it says:

“It is further resolved that the Secretary be authorized and instructed to certify upon the face of all outstanding certificates of stock that the same are now fully paid up,” from which I think it can be assumed on the face of the stipulation that those certificates had been issued and were in the hands of the stockholders.

The Court: All right. Do you want to file briefs under the rule?

Mr. Goldberg: I would like to file a brief, your Honor. I don't recall now how much time we would have.

The Court: 45 days.

Mr. Goldberg: That is satisfactory.

Would that be an opening brief?

The Court: They will be simultaneous briefs and you can have 20 days for a reply.

The Clerk: That will be January 10th for the opening briefs and January 31st for the reply briefs.

(Whereupon, at 10:30 a.m., the hearing in the above entitled matter was closed.) [105]

[Title of Tax Court and Cause.]

CERTIFICATE

I, B. D. Gamble, clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 109, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 17th day of October, 1944.

[Seal]

B. D. GAMBLE

Clerk, The Tax Court of the  
United States

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[Endorsed]: No. 10908. United States Circuit Court of Appeals for the Ninth Circuit. Lenore S. Robinette, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed: October 31, 1944.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals  
for the Ninth Circuit

No. 10908

LENORE S. ROBINETTE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

STATEMENT OF POINTS TO BE RELIED ON  
IN THIS APPEAL AND DESIGNATION  
OF PORTIONS OF RECORD NECESSARY  
FOR CONSIDERATION THEREOF

To the Judges of the United States Circuit Court  
of Appeals for the Ninth Circuit and to the  
Clerk of Court:

Now comes the petitioner in the above entitled and numbered proceeding and pursuant to Subdivision (6) of Rule 19 of the Rules of Practice of this Court files with the Clerk of Court her statement of the points on which she intends to rely on the appeal and designates the parts of the record which she thinks necessary for the consideration thereof.

1. The legal question involved in this proceeding is whether upon the liquidation in 1936 of a subsidiary corporation pursuant to Section 112(b) (6) of the Revenue Act of 1936 the earnings and profits of the liquidated subsidiary became the earnings and profits of the parent corporation.

2. The Tax Court of the United States based its decision that upon such liquidation the earnings and profits of the subsidiary corporation became the earnings and profits of the parent corporation upon *Commissioner vs. Sansome* (2 Cir. 1932) 60 Fed. (2d) 961, certiorari denied 287 U. S. 667, and succeeding cases, particularly *Estate of Howard H. McClintic* (1942) 47 B.T.A. 188, upon Section 115(h) of the Revenue Act of 1936 as amended in 1938, and upon Article 115-11 of Regulations 94 accompanying the Revenue Act of 1936.

3. Petitioner contends that the decision of the Tax Court of the United States is not in accordance with law and is erroneous for the following reasons:

(a) The principle of *Commissioner vs. Sansome*, supra, dealt exclusively with transfers to a corporation in connection with a reorganization and is not applicable to the liquidation of a subsidiary corporation. Prior to the present decision the Sansome rule had not been applied to a corporate liquidation not a part of a reorganization. The facts in *Estate of Howard H. McClintic*, supra, were not the same as in the case at bar and therefore such case is not controlling here.

(b) The question of the extent to which the principle of *Commissioner vs. Sansome*, supra, should be applied was before Congress in the preparation of the Revenue Act of 1936 and at that time Congress by means of Section 115(h) of said Act determined to limit the application of the principle of *Commissioner vs. Sansome*, supra, to tax free

reorganizations and not to extend the same to liquidations of subsidiaries as was subsequently done by the amendment of Section 115(h) in the Revenue Act of 1938.

(c) Since the Sansome rule as enacted by Congress in Section 115(h) of the Revenue Act of 1936 did not apply to distributions of money or property in connection with a complete liquidation under Section 112(b)(6) of the Revenue Act of 1936, Article 115-11 of Regulations 94 insofar as it purported to prescribe a rule that a distribution of money or property in a complete liquidation to a distributee corporation increased the earnings or profits of said corporation was without statutory authority.

(d) The 1938 amendment to Section 115(h) of the Revenue Act of 1936, extending the Sansome rule to apply to distributions of money or property in connection with a complete liquidation under Section 112(b)(6) of the Revenue Act of 1936 has been expressly held by the Supreme Court of the United States to have no effect on liquidations in 1936 and the attempt of the Treasury Department in Regulations 94, Article 115-11 to apply the principle of the Sansome case as set forth in Section 115(h) of the Revenue Act of 1936 to the liquidation of subsidiaries was unauthorized and has been so held by the courts.

4. The parts of the record necessary for the consideration of the points relied upon by petitioner are as follows:

(a) Docket entries of proceedings before The Tax Court of the United States;

(b) Pleadings before The Tax Court of the United States;

(c) Findings of fact, opinion and decision of The Tax Court of the United States;

(d) Order of The Tax Court of the United States dated June 5, 1944, on the motion by petitioner for rehearing and reconsideration of The Tax Court's opinion and decision entered April 27, 1944;

(e) Motion by petitioner for rehearing and reconsideration;

(f) Petition for review;

(g) Agreed statement of facts;

(h) Transcript of proceedings before The Tax Court of the United States.

Respectfully,

JESSE H. STEINHART

JOHN J. GOLDBERG

111 Sutter Street

San Francisco, California

Attorneys for Petitioner.

Dated: November 2nd, 1944.

(Affidavit of Service attached.)

[Endorsed]: Filed Nov. 3, 1944. Paul P. O'Brien, Clerk.